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in the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-724

MARTIN SKLAROFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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The Petitioner, Martin Sklaroff, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 30, 1971.

OPINION BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto and is designated as Appendix "A".

The petition for rehearing filed by the Defendant Sklaroff was denied on November 1, 1971. A copy of said denial of the petition for rehearing is attached hereto as Appendix "B". No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on September 30, 1971. A timely petition for rehearing was denied on November 1, 1971, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked, under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether in view of the decisions in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States* 390 U.S. 62 (1968), evidence obtained as a result of a pre*Marchetti-Grosso* search by a warrant predicated on allegations relating to violations of the Wagering Tax Act, should have been excluded after proper objection on Fourth and Fifth Amendment grounds, in a criminal prosecution under 18 U.S.C. 1084 and 1952.

2. Whether the Court's restrictions during the "Alderman" hearing regarding the discovery of the Government's illegal bugging activities, were error in view of the resultant inability of the Defendants to ascertain taint.

STATUTORY PROVISIONS INVOLVED

Fourth Amendment to
the Constitution of the United States

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to
the Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in a land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner Martin Sklaroff and Morton Kane were found guilty on March 22, 1967 of Counts I and IV of an Indictment under which they were being tried, charging conspiracy to violate Title 18, United States Code, Section 1084 and using telephones in interstate commerce to promote gambling in violation of Title 18, United States Code, Section 1952. As part of the Government's proof that the Defendants Sklaroff and Kane committed the crimes of which they were convicted, certain evidence was introduced during the course of the trial obtained as a result of a search warrant issued on March 26, 1965.

To obtain this search warrant, on the 26th day of March, 1965, Francis C. Smith, Special Agent Internal Revenue Service, and Edwin J. Sharp and Warren Welsh, Special Agents, Federal Bureau of Investigation, filed affidavits for search warrants before the United States Commissioner for the Southern District of Florida. These affidavits contained allegations relating to violations of the Wagering Tax Act and were directed against the premises occupied by Morton P. Kane. As a result of these affidavits the United States Commissioner, Edward Swann, issued a search warrant for the premises occupied by Morton Kane. This warrant directed seizure of items intended to be used in violation of Sections 4411, 4412, 4901(a) and 7203 of the Internal Revenue Code of 1954 (Wagering Tax Offenses).

Upon entering the premises Agent Smith, with other agents of the Internal Revenue Service, found Morton P.

Kane and Martin Sklaroff on the premises with other people. The Defendants Sklaroff and Kane, and the premises, were searched and certain items were seized.

Some of the items seized as a result of this search were admitted into evidence at the original trial of this case on March 16, 1967. These were Government Exhibits 65, 66, 90 and 91, admitted through the testimony of Special Agent Smith. At the trial, Special Agent Smith was also allowed to testify that he had been assigned to special duties for the last 3 or 4 years on the wagering tax squad, and that those duties primarily consisted of seeking out violations of the Wagering Tax Laws. Agent Smith also identified Martin Sklaroff and Mr. Kane as being those persons who were on the premises at the time of his search conducted on March 27, 1965. Smith further testified that the telephone number connected with the premises where Kane and Sklaroff were found was 751-1608.

The testimony of Agent Smith thus laid the foundation for the testimony of Wanda Lou Irving, Thomas L. Carney, George Brouebake, and the introduction of Government Exhibits 92, 93 and 94.

As a result of the testimony of these witnesses and the exhibits, the Government was able to show that Sklaroff and Kane were connected with credit cards issued in fictitious names and used by the Defendants for long distance calls in violation of Title 18, United States Code, Section 1952; that they were in the business of betting or wagering in violation of the same statute; and further that there was an illegal agreement between them in violation of Title 18, United States Code, Section 371.

The Government in this case also introduced over Defendant's objections on Fifth Amendment grounds the original income tax returns for Martin Sklaroff and his wife for the years of 1963 through 1965, Government Exhibits 4, 7 and 8. These exhibits reflected that gambling was one of the major sources of Sklaroff's income in the years 1963 through 1965 and also showed a payment of $62.50 for the gambling stamp tax license in 1965.

In closing argument, the Government relied, inter alia, upon the Defendant's tax returns to show their source of income from gambling, the records seized on March 27, 1965, and Mr. Sklaroff's fingerprint on a certain envelope which was predicated on the testimony of Agent Smith, as to his raid on March 27, 1965, connecting telephone number 751-1608 to the premises. Moreover, the Government's trial brief stated that the tax returns would be used to show proof of business enterprise in the business of betting and wagering.

REASONS FOR GRANTING WRIT

I

WHETHER IN VIEW OF THE DECISIONS IN *MARCHETTI v. UNITED STATES* 390 U.S. 39 (1968) AND *GROSSO v. UNITED STATES* 390 U.S. 62 (1968), EVIDENCE OBTAINED AS A RESULT OF A PRE-*MARCHETTI-GROSSO* SEARCH BY A WARRANT PREDICATED ON ALLEGATIONS RELATING TO VIOLATIONS OF THE WAGERING TAX ACT, SHOULD HAVE BEEN EXCLUDED AFTER PROPER OBJECTION ON FOURTH AND FIFTH AMENDMENT GROUNDS, IN A CRIMINAL PROSECUTION UNDER 18 U.S.C. 1084 and 1952.

In the instant case, the court below held that evidence obtained in violation of the Defendant's constitutional rights as set forth in *Marchetti* and *Grosso*, could nonetheless be admitted in their trial, notwithstanding proper objection to such admission on Fifth Amendment grounds. This decision is in conflict with the ruling of this Honorable Court in *Lookretis v. United States*, 390 U.S. 338 (1968). As in *Lookretis* (see *United States v. Lookretis*, 398 F.2d 64), evidence in the instant case was obtained against the Petitioner as a result of his non-compliance with the Federal Tax Statutes for the years 1963 and 1964. Further, evidence was admitted at trial which was obtained directly or indirectly through the disclosures by the Petitioner Sklaroff compelled by his compliance with the said Statute in the year 1965.

Shortly after its decisions in *Marchetti* and *Grosso* this Court granted certiorari in *Rainwater v. Florida* 390 U.S. 196 (1968). As in *Lookretis*, the Supreme Court vacated the decision and remanded the case for further consideration in light of *Marchetti v. United States, supra*. In *Rainwater v. Florida, supra* the evidence was obtained by Federal officers pursuant to a Federal search warrant. This evidence was the basis for a Federal prosecution which was later abandoned. The evidence thus obtained was turned over to State authorities and the Third District Court of Appeals of Florida held it to be admissible in evidence on the State charge. See *Rainwater v. State*, 186 So.2d 278 (Fla. 3rd Dist., 1966). After the Supreme Court vacated and remanded the case, the Third District vacated their previous judgment and reversed the judgment of the Criminal Court of Record In and For Dade County, Florida, with directions to the Criminal Court to grant a new trial, *Rainwater v. State*, 208 So.2d 865 (Fla. 3rd Dist. 1968).

Thus, in both the *Lookretis* and *Rainwater* cases, evidence obtained by Federal agents based upon wagering tax violations was not allowed to be used to prosecute and convict defendants of other State and Federal crimes.

Also, Petitioner's 1965 tax return was used against him over objection on Fifth Amendment grounds to show his purchase of a gambling tax stamp license.

The instant case is unlike the situation affirmed by this Honorable Court in *Mackey v. United States*, ___ U.S. ___, 91 S.Ct. 1160; 28 L.Ed.2d 404 (1971), wherein *Marchetti* and *Grosso* were not held retroactive to the use of wagering excise tax returns in a criminal prosecution.

Petitioner contends that Mr. Justice Harlan's opinion in the *Mackey* decision is of substantial importance since the instant case appears before this Honorable Court on direct review and is not a collateral attack on the conviction. Further, the instant case has far greater prejudice to the Petitioner than the mere use of the excise tax returns in evidence, since substantial other testimony and evidence used to convict the Petitioner was introduced over objections on the Fifth Amendment. This evidence was all obtained as a result of the Petitioner's failure to comply with the Wagering Tax Law.

II

WHETHER THE COURT'S RESTRICTIONS DURING THE "ALDERMAN" HEARING REGARDING THE DISCOVERY OF THE GOVERNMENT'S ILLEGAL BUGGING ACTIVITIES, WERE ERROR IN VIEW OF THE RESULTANT INABILITY OF THE DEFENDANTS TO ASCERTAIN TAINT.

The Petitioner's argument regarding this question of law is being set forth by the co-petitioner, Martin Kane in his Petition for Certiorari to be filed in this Court on or before December 8, 1971. Martin Kane was the co-defendant with the Petitioner Sklaroff in the trial of this case and was also a co-appellant on the appeal before the Fifth Circuit Court of Appeals. The Petitioner Martin Sklaroff respectfully adopts (as was done in the appeal in the Fifth Circuit) all arguments raised by the Petitioner Martin Kane in his Petition for Certiorari, arising out of the same decision from which the instant Petition stems.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 1971, a copy of the above Petition for Writ of Certiorari was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. and to Robert W. Rust, Office of the United States Attorney, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

_____

JAMES J. HOGAN